United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of U.S. DEPARTMENT OF DEFENSE, DEPARTMENT OF THE AIR FORCE, MALSTROM AIR FORCE BASE CASCADE COUNTY, MONTANA And AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, LOCAL 2609	Case No. 20 FSIP 040

DECISION AND ORDER

BACKGROUND

This case, filed by the U.S. Department of Defense, U.S. Department of the Air Force, Malstrom Air Force Base, Cascade County, Montana (Agency or Management) on March 24, 2020, concerns the parties' successor collective bargaining agreement. The Agency is a component of the U.S. Department of the Air Force and houses several components that provide different areas of support to further the mission of the Air Force. The American Federation of Government Employees, Local 2609 (Union) represents over 400 bargaining-unit employees in a variety of positions. The parties are governed by a collective-bargaining agreement (CBA) that expired on October 23, 2018, but is in a year-to-year rollover status. This case arises under Section 7119 of the Federal Service Labor Management Relations Statute (the Statute).

BARGAINING HISTORY

The parties have a lengthy bargaining history. In short, the Union requested to reopen the CBA in 2016 and the parties began negotiations in September 2016. The parties did not provide a defined timeline of negotiations, but sometime during negotiations, the parties reached tentative agreement on numerous articles. However, President Trump's Labor Executive Orders went into effect in October 2019 because of Federal court litigation. As a result, the Agency informed the Union that it

did not have the authority to agree to language that conflicted with those Orders.

Eventually, the Agency unilaterally implemented a successor agreement and, after discussion with the Union, the Union elected to subject that agreement to a ratification vote as a "remedy" to the Agency's implementation. The bargaining-unit members rejected several articles so the parties resumed negotiations during the winter of 2019/2020 for five sessions. They then received assistance from a Mediator with the Federal Mediation and Conciliation Services (FMCS) in March 2020. The parties had multiple sessions but could not reach agreement. Accordingly, the Mediator released the parties on March 6, 2020, in Case No. 2018N0502305. On May 21, 2020, the Panel asserted jurisdiction over two articles in dispute[1] and ordered this matter to be resolved through a Written Submissions procedure with an opportunity for rebuttal statements.

ISSUES

I. Negotiated Grievance Procedure

A. Agency Position

The first article concerns the parties' negotiated grievance procedure. The Agency proposes excluding the following topics: (1) decisions concerning conduct and performance that are appealable to the Merit Systems Protection Board (MPSB); (2) challenges to annual performance ratings; and (3) challenges concerning performance awards and pay.[2]

The Agency's argument is premised largely upon the requirements of Executive Order 13,839 "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles" (May 25, 2018) (Removal Order). Section 3 of the Removal Order calls for agencies to exclude challenges to removal actions from a negotiated grievance procedure. The Agency acknowledges that this section does not address MSPB actions in general. As such, Management's arguments focus primarily upon removal actions.

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[1] The Agency's request for Panel assistance included four other articles. But, after discussion, the Agency agreed to withdraw those articles because they were not appropriately before the Panel.

[2] *See* Agency Position at 1.

The Agency has seen a low incidence of removal actions, with only three arising since 2006. And, only one of those employees utilized the negotiated grievance procedure.[3] Further, per an Air Force Instruction, the Air Force's national Air Force Legal Operations Agency, Labor Law Field Support Center (Air Force Support) provides expert support to removal actions before the MSPB and other third-party forums. They do not, however, support grievance actions. Thus, more Agency resources must be devoted when a grievance is involved. And, in any event, employees may still grieve actions that cannot be appealed to the MSPB, e.g., suspensions of 14 days or fewer.

Turning to challenges involving performance ratings and incentive pay, the Agency notes that Section 4 of the Removal Order instructs agencies to exclude these challenges from a negotiated grievance procedure.[4] Additionally, the Agency's facilities have never seen a grievance involving challenges to performance ratings. The Department of Defense has an instruction (DoD instruction) that establishes informal procedures for resolving performance disputes, including an administrative grievance.[5] This procedure, then, is available to an employee regardless of what is covered under the grievance procedure.[6] As such, permitting grievances to move forward on this topic would be inefficient.

As to incentive awards, Management notes that there have been no grievances on this topic within the past 10 years. The DoD instruction promotes the use of various incentive awards in order to bolster recruitment and retention efforts.[7] Permitting grievances on this topic would reduce the effectiveness of the foregoing. And, in any event, the Union could always file a grievance over the *procedures* involved.

Finally, Management rejects the Union's claim that the parties have a tentatively signed agreement on this topic. Indeed, e-mail communications from March 2020 show that the Agency's language remained a topic of disagreement following mediation.[8]

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[3] *See id.* at 3-4.

[4] *See id.* at 8.

[5] *See id.* at 6-7 (citing DODI1400.25V431_AFI36-1002, Performance Management and Appraisal Program Administration in the Air Force, dated 15 November 2019).

[6] *See id.*; *see also* Agency Rebuttal at 2-3.

[7] *See* Agency Position at 8.

[8] *See* Agency Rebuttal at 2, 5-6.

B. Union Position

The Union argues that, as part of these CBA negotiations, the parties tentatively agreed to strike most of Management's proposed grievance exclusions. During post-ratification negotiations on December 18, 2019, the Agency submitted a proposal agreeing to strike its language concerning annual ratings and incentive pay.[9] The Union claims that on December 19th and 20th, the Union accepted Management's language.[10] The parties' ground rules do not permit a party to reopen a tentative agreement barring mutual consent.[11] The Union never gave that consent. As such, the Union argues that the Agency should not be permitted to engage in regressive negotiations.

On the merits, the Union argues that it needs the grievance process in order to ensure it has access to an impartial forum that is not cost prohibitive. The Statute permits access to an arbitrator; indeed, 5 U.S.C. §7121 grants the right to elect to pursue either a grievance or an action to the MSPB when appropriate.[12]

C. Conclusion

The Panel will impose compromise language. In this regard, the Panel will reject the Agency's MSPB-exclusion proposal but accept its other two proposed exclusions. As an initial matter, the Panel first addresses the Union's argument concerning an alleged tentative agreement.

The Union's tentative-agreement claim is unsupported. As part of its Written Submissions, the Union now[13] provides

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[9] Union Rebuttal, Attach. 3 at 3 (suggesting striking Articles 16.2.b and c, i.e., exclusions to challenges involving annual ratings and incentive pay).

[10] *See id.*, Attach., Union Email of December 19, 2019.

[11] Section 5.4.F of the parties' ground rules states that "[o]nce a section/article is initialed/signed, it will not be subject to further discussion unless there is a mutual agreement by the Chief Negotiators to reconsider or revise the agreed-upon language."

[12] *See* 5 U.S.C. §7121(d).

[13] During the Panel's investigation, in a statement dated April 10, 2020, the Union claimed only that Panel jurisdiction was inappropriate because the parties had not made "genuine" attempts to reach agreement, as required by the ground rules,

documents that purportedly demonstrate the existence of a tentative agreement between the parties. This documentation is haphazard, however. Although there is a December 18-email from Management appearing to propose striking Management's language on annual ratings/incentive pay, there is no corresponding email from the Union informing Management that it accepted that language. Instead, the Union provided only a December 19th-email that appears to show the Union's bargaining team discussing amongst itself a "recommendation" to accept Management's language. Confusing things further, the Agency provided a March 6, 2020, post-mediation email in which the Agency informed the Union that the parties agreed that the aforementioned topics remained in dispute. The Union provided nothing to rebut this email. The evidence in the record cannot be said to conclusively establish whether the parties have a tentative agreement. The Union's claim, then, must be rejected. To the extent any such disagreement remains, the Union may file a grievance or unfair labor practice concerning a violation of the parties' ground rules.

Turning to the merits, the Panel has recognized the significance of Federal court precedent that addresses grievance exclusions. The Panel has acknowledged the United States Court of Appeals for the District of Columbia's conclusion that a proponent of grievance exclusion must "establish convincingly" in a "particular setting" that this position is the "more reasonable one." The Panel has further clarified that the Removal Order – and related Executive Orders – demonstrates important public policy that must be taken into consideration when resolving these disputes. That consideration, however, differs depending upon the exclusion that is involved. With that framework in mind, the Panel will turn to addressing each of Management's three proposed exclusions.

i. MSPB Actions

The Panel rejects this proposed exclusion. Under Section 3 of the Removal Order, an agency "shall endeavor" to exclude grievances involving removal actions in a negotiated grievance procedure "[w]henever reasonable in view of the particular circumstances."[14] The Panel has recognized that this language means that a party seeking exclusion of this topic has a burden

prior to coming to the Panel. The Union did *not* claim the parties had an existing tentative agreement.

[14] Executive Order 13,839, Section 3.

to demonstrate that exclusion is reasonable under the "particular circumstances" of the dispute before the Panel.[15]

The Agency's proposal is overbroad. Actions appealable to the MSPB do include removals. But they also include a wide swath of other personnel actions, such as suspensions of greater than 14 days, demotions, etc.[16] Section 3 of the Removal Order, then, is inapplicable. Nevertheless, most of the Agency's arguments in support of exclusion focus on removal actions. The Panel has rejected proposed grievance exclusions that cover a variety of broad MSPB-based exclusions when a party presents arguments that focus on a limited personnel action.[17]

The only other "unique" argument presented by Management concerning removal is its claim that an inaccessibility to the Air Force Support Center hinders Management's ability to respond to grievances. But, Management provided no data to support this contention. To the contrary, as noted above, Management has dealt with only one removal grievance within the past *fourteen years.* It is unclear how such a dearth of grievance-based actions could truly impact Management's operations in a negative fashion. Accordingly, based on all of the foregoing, the Agency has not demonstrated that its proposal is appropriate under these circumstances.

ii. Annual Ratings and Incentive Pay

The Panel imposes both of Management's proposed exclusions for annual ratings and incentive pay. As noted above, Management supports these exclusions, in part, with the Removal Order. Sections 4(a)(i) and (ii) of the Order call upon agencies to exclude challenges to "ratings of records" and "any form of incentive pay" from a negotiated grievance procedure in order to "promote good morale in the Federal workforce, employee accountability, and high performance, and to ensure the effective and efficient accomplishment of agency missions and the efficiency of the Federal service."[18] The Panel has adopted

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[15] *See, e.g., U.S. Dep't of the Def., U.S. Dep't of the Air Force, Fairchild Air Force Base and Ass'n. of Civilian Technicians, #138*, 19 FSIP 070 at 10-11 (2020)(*Fairchild*).

[16] *See* 5 U.S.C. §§ 7502, 7512.

[17] *See NASA, Kennedy Space Center and AFGE, Local 513*, 20 FSIP 025 at 9-10 (2020) (rejecting proposal to exclude "adverse actions" from grievance procedure where agency relied primarily upon Section 3 of Removal Order).

[18] Executive Order 13,839, Section 4(a)(i).

proposals that rely upon the policy implications of Sections 4(a)(i) and (ii),[19] and it is appropriate to do so within these circumstances as well.

The Agency also notes that a DoD Instruction calls for a uniform administrative process for resolving the type of disputes covered by these proposed exclusions. The Panel has viewed the existence of such uniform policies as a rationale to justify excluding topics from grievance procedures.[20] It is appropriate to reach a similar conclusion in these circumstances. Indeed, as to annual ratings, the DoD instruction permits reconsideration and administrative grievances. Thus, the Union's interest in being heard by a "higher authority" within the Agency is partially satisfied.

For all the foregoing reasons, the Agency has demonstrated that its proposals on these two topics are the more reasonable ones. Thus, they will be adopted.

II. Contract Duration

A. Agency Position

The second article involves the duration of the successor CBA. The Agency proposes a duration of 5 years because of the resources associated with bargaining a new agreement. The parties began negotiations over this successor CBA in 2016. The Agency provided a 32-page proposal while the Union provided a 115-page "rewrite" of the contract.[21] As a result, the parties spent nearly 4 years on negotiations and devoted 1,440 employee hours and $178,000 in salary (excluding benefits) for a unit of around 400 employees.[22] A 5-year term would lessen the reoccurrence of these bargaining costs, and the Union's arguments to the contrary are speculative.[23]

Relatedly, for the "rollover" period, the Agency includes language that changes the duration of this period from 3 years to 1. According to the Agency, the parties have a "long history

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[19] *See, e.g., Fairchild*, 19 FSIP 070 at 6-7, 12.
[20] *See id.* at 14.
[21] Agency Position at 9.
[22] *Id.* at 10.
[23] *See* Agency Rebuttal at 3.

of exercising automatic extension proceedings."[24] Modifying the rollover period to 1 year provides the parties with more opportunities to renegotiate the CBA after the initial 5-year period concludes. Such a scheme would grant the parties more opportunities to address existing inefficiencies that arise during the life of the contract.

B. Union Position

The Union proposes a duration period of 3 years. The Union claims it needs to have the ability to renegotiate after a 3-year period because of "continuing changes in political ideology and the subsequent effects on employee rights."[25]

C. Conclusion

The Panel will impose Management's language. Management has provided undisputed data concerning the reoccurring costs of bargaining the parties' CBA. A duration period of 5 years, rather than 3, will ensure those costs are kept to a minimum. Management's proposed rollover period makes sense for similar reasons. If, for some reason, the parties elect not to bargain the CBA during the renewal period, they will be more quickly presented with an opportunity to address any inefficiencies that exist under the contract. Otherwise, the parties would have to wait 3 full years to turn back to the contract. On balance then, Management's language is the most appropriate resolution.

ORDER

Pursuant to the authority vested in the Federal Service Impasses Panel under 5 U.S.C. §7119, the Panel hereby orders the parties to adopt the provisions as stated above.

Mark A. Carter
FSIP Chairman

June 26, 2020
Washington, D.C.

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[24] Agency Position at 10.

[25] Union Position at 2. The Union also again contends that the parties had tentative agreement on this article. But, this position is a rehash of the previously discussed argument and should be rejected for the reasons already discussed.